

**3.0**

**ALTERNATIVES  
INCLUDING THE  
PROPOSED ACTION**

### 3.0 ALTERNATIVES INCLUDING THE PROPOSED ACTION

#### 3.1 Introduction

For this EA, NMFS conducted internal scoping and augmented the process with issues that arose during the public scoping for the initial 4(d) rule NEPA compliance (subsection 1.1, Background). In combination, the outcome of these two scoping processes revealed the following overall concerns related to the 4(d) rule and the limits :

1. Conserve listed salmonids and the habitats upon which they depend.
2. Follow the mandates of the ESA (observe the law).
3. Allow people to participate more fully in species conservation and thereby encourage voluntary compliance.
4. Streamline the process for making determinations on RRM programs under the ESA.
5. Develop fertile partnerships with states and local citizens to ensure that future resource activities go forward in a fish-friendly, innovative, and cooperative manner.

The alternatives described below were designed to address these concerns.

#### 3.2 Alternatives Considered but Eliminated from Detailed Study

No reasonable alternatives were identified beyond those that would meet the purpose and need for the Proposed Action as described below.

#### 3.3 Alternative 1 - No Action

The No Action alternative does not respond to any of the concerns stated above (subsection 3.1, Introduction). Rather, it explores the likely consequences of not implementing the 4(d) rule or its limits for the 14 threatened salmon and steelhead ESUs. As such, it represents the physical and biological status quo; it presents a picture of the environmental and social baseline against which the effects of taking any action are measured.

Although the 4(d) rule is currently in place, Alternative 1 represents a situation in which no 4(d) rule was implemented. That is, under Alternative 1, no take prohibitions have been put into place and, as a consequence, there are no limits on those prohibitions. The practical results of this scenario are that the species are still listed as threatened, but there are no broad regulations in place to ensure ESA section 9 protections. Federal agencies would still be required to consult with NMFS on the probable effects of any action they contemplate because section 7 of the ESA would still apply. (Any Federal action that “may affect” a listed species must be analyzed under the regulations implementing section 7 of the ESA. This process is known as a “consultation,” and the need to engage in it goes into effect as soon as a species is listed.) However, without the

4(d) rule, various state, private, and tribal actions could be implemented without considering their effects on threatened species, unless there was a requirement to consult with NMFS under section 7. The reason for this is that there would be no ESA mandate to consider those effects, and therefore many activities that could have an adverse effect on listed species could continue unchecked or unmonitored by NMFS for ESA compliance.

Historic trends influencing species' declines within the analysis area would likely continue under Alternative 1 where local, state, and Federal laws are not implemented to protect fish and other resources. Numerous policies and regulations have been established throughout the Pacific Northwest and California to address degradation to fish habitat and fish populations which may improve baseline conditions over time. Under Alternative 1, however, unless there is a section 7 requirement, NMFS would not have the management options necessary for involvement in ongoing cooperative conservation efforts under established local and state resource protection regulations, or to foster additional planning efforts with state and tribal entities.

Finally, Alternative 1 would not meet ESA mandates. According to section 4(d) of the ESA: "Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary to provide for the conservation of such species." Thus, the Secretary *must* issue a 4(d) rule whenever a species is listed as threatened. Additionally, this alternative does not support the NOAA Strategic Plan (subsection 2.2, Purpose and Need). Nevertheless, this No Action scenario provides an appropriate baseline for analyzing effects under each alternative.

### 3.4 Alternative 2 – Proposed Action

The Proposed Action was designed to respond, as fully as possible, to the issues identified during NMFS' internal NEPA scoping process for this EA and the issues that arose during the public scoping for the July 2000 4(d) rule NEPA compliance (subsection 3.1, Introduction). Under the Proposed Action, the ESA section 9 take prohibitions would be put into place, but there would be a limit on their application for RRM programs that meet the Limit 10 criteria defined in the 4(d) rule. That is, if a state, county, city, or port entity submits an RRM program for approval, and NMFS determines that it meets the criteria stated for Limit 10 consistent with the conservation of listed fish, then NMFS would not find it necessary to apply the take prohibitions under section 9(a)(1)(B) and 9(a)(1)(C).

For an RRM plan to receive NMFS' approval, it must meet one of the following criteria:

#### ODOT Transportation-Equivalent or Better RRM Plans (10)(i)

- constitute an RRM activity conducted by Oregon Department of Transportation (ODOT) employees (or their agents) that complies with ODOT's *Transportation Maintenance Management System Water Quality and Habitat Guide* (ODOT, 1999)(Appendix A), or

- be conducted by the employees or agents of a state, county, city, or port under a program that complies substantially with the ODOT Guide and has been determined to meet or exceed the protections found in the ODOT Guide, or

#### RRM Plans Meeting Properly Functioning Conditions (10)(ii)

- be conducted by the employees or agents of a state, county, city, or port in a manner that has been found to contribute to properly functioning conditions<sup>4</sup> (Appendix B).

For a state, city, county, or port program that is equivalent to the ODOT program (or any of its amendments) to qualify under Limit 10 (i), it must be approved in writing by NMFS' Northwest or Southwest Regional Administrator, whichever is appropriate. Any jurisdiction desiring its RRM activities to qualify under Limit 10 (i) in this manner must have adopted RRM guidelines equivalent to or better than the ODOT Guide, detailing how it will assure adequate training, tracking, and reporting, and describing in detail any dust abatement practices it requests to be covered. Data from the tracking and reporting programs in both (10)(i) and (10)(ii) will be used to determine whether impacts on threatened ESUs are as predicted or if an altered or strengthened RRM plan is needed. Pesticide and herbicide spraying is not included within this limit, even if in accord with the ODOT Guide. The full procedure for meeting Limit 10 (i) is found at 50 CFR 223.203(b)(10)(i) in the 4(d) rule (65 FR 42422).

NMFS finds the RRM activities of any state, county, city, or port to be consistent with the conservation of listed salmonids' habitat when it contributes, as does the ODOT Guide, to the attainment and maintenance of properly functioning condition. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward properly functioning condition. The full procedure for meeting Limit 10 (ii) in this fashion is found at 50 CFR 223.203(b)(10)(ii) in the 4(d) rule (65 FR 42422).

Prior to approving any state, city, county, or port program as within this limit, or approving any substantive change in a program within this limit, NMFS would publish notification in the Federal Register announcing the availability of the program or the draft changes for public review and comment. Such an announcement would provide for a comment period of not less than 30 days.

Periodically, NMFS would evaluate each approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS would identify to the jurisdiction ways in which the program needs to be

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<sup>4</sup>NMFS defines properly functioning condition as the sustained presence of natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation (65 FR 42422).

1 altered or strengthened. Changes may be identified if the program is not protecting desired  
2 habitat functions, or where even with the habitat characteristics and functions originally targeted,  
3 habitat is not supporting population productivity levels needed to conserve the ESU. If any  
4 jurisdiction within the limit does not make changes to respond adequately to the new information  
5 in the shortest amount of time feasible, but not longer than one year, NMFS would publish  
6 notification in the Federal Register announcing its intention to withdraw the limit so that take  
7 prohibitions would then apply to the program as to all other activity not within a limit. Such an  
8 announcement would provide for a comment period of no less than 30 days, after which NMFS  
9 would make a final determination whether to subject the activities to the ESA section 9(a)(1)  
10 prohibitions.

11  
12 Finally, the Proposed Action meets the ESA mandates by putting in place the section 9 take  
13 prohibitions to provide for the conservation of the listed ESUs. It also provides another option to  
14 entities beyond the ESA section 7 and section 10 tools to conserve listed ESUs and fosters  
15 cooperative management relationships with state, county, city, and port entities. This alternative  
16 supports the NOAA Strategic Plan.

### 17 18 19 **3.5 Alternative 3 – Take Prohibitions**

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21 Alternative 3 responds primarily to the scoping concerns that NMFS protect salmonids and their  
22 habitat and that management practices are legal (subsection 3.1, Introduction). And while it  
23 would not rule out the possibility of meeting other scoping concerns identified, Alternative 3  
24 would not expressly address them (subsection 3.1, Introduction).

25  
26 Alternative 3 represents the process currently applied by NMFS and the U.S. Fish and Wildlife  
27 Service for protecting threatened species. Under this alternative, ESA section 9 take prohibitions  
28 would be imposed, and implementing an RRM program affecting listed salmon and steelhead  
29 may require consultation with NMFS under section 7, or an incidental take permit under section  
30 10 (which also requires consultation).

31  
32 Under Alternative 3, there would continue to be a benefit to listed fish because of the adequacy  
33 of the current ESA regulatory mechanisms (i.e., section 7 and section 10, intended to modify  
34 actions and change project designs to avoid jeopardizing listed fish). The goal of these  
35 regulatory programs is to reduce the impacts of a wide range of actions to help conserve the 14  
36 threatened ESUs. However, NMFS would lack the flexibility of implementing an additional  
37 management tool, i.e., Limit 10, to meet conservation requirements under the ESA and to foster  
38 cooperative management relationships with state, county, city, and port entities beyond the  
39 section 7 consultation or incidental take permit option. Consequently, Alternative 3 would limit  
40 NMFS ability to meet the objectives of the NOAA Strategic Plan (NOAA 1997) (subsection 2.2,  
41 Purpose and Need).